Supreme Court, U.S.
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No. 99-647

IN THE

Supreme Court of the United States

JOHN P. FONTENOT, *et al.*,

Petitioners,

v.

ENSCO PLATFORM COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent, ENSCO Platform Company, discloses that it is a wholly owned subsidiary of ENSCO International, Inc., which is a publicly traded company. Dual Drilling Company was the predecessor to ENSCO Platform Company, but Dual Drilling Company is no longer an active entity.

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ARGUMENT

Petitioner, John P. Fontenot, requests this Court to either adopt a maritime rule of decision or to create a new rule of federal common law to apply to personal injury actions arising on fixed platforms on the Outer Continental Shelf. In his arguments to this Court, Petitioner all but ignores the Outer Continental Shelf Lands Act ("OCSLA") , 43 U.S.C. § 1331, *et seq.*, the very statute which governs his cause of action against respondent, ENSCO Platform Company ("ENSCO"). Based on OCSLA's mandatory application of adjacent state law to personal injury actions arising on OCSLA structures, this Court has rejected similar efforts to displace applicable state law in matters arising under the OCSLA. ENSCO shows below why Petitioner's effort to have this Court disregard Louisiana's rule of comparative fault is contrary to OCSLA and this Court's prior decisions interpreting OCSLA.

A.

THIS COURT HAS REJECTED PREVIOUS EFFORTS TO APPLY MARITIME LAW OR TO DEVELOP FEDERAL COMMON LAW TO DISPLACE STATE LAW IN ACTIONS ARISING UNDER OCSLA.

The Outer Continental Shelf Lands Act was enacted by Congress in 1953 to define a body of law applicable to the seabed, the subsoil, and the fixed structures on the Outer Continental Shelf. In *Rodrigue v. Aetna Casualty and Surety Company,* 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969), this Court discussed at length the legislative history underlying the enactment of OCSLA. As this Court discussed in *Rodrigue,* there was a debate as to whether adjacent state

law or maritime law would apply to the fixed platforms situated on the Outer Continental Shelf. In its final form, OCSLA adopted the law of the adjacent state as surrogate federal law which would apply to actions arising on fixed platforms on the shelf. The operative provision of OCSLA at issue in this case is 43 U.S.C. § 1333(a)(2)(A) which provides, in pertinent part, as follows:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, **the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States** for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the state if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . (Emphasis added.)

Rodrigue presented this Court with an opportunity to explore the meaning of the foregoing provision. *Rodrigue* involved two deaths arising on fixed offshore platforms on the Outer Continental Shelf. The question presented was whether Louisiana tort law or the Death on the Highs Seas Act ("DOHSA") (with its limitation on recoverable damages) would apply. This Court held that DOHSA did not apply to the platform-related deaths because Congress, in the OCSLA, deliberately rejected the application of admiralty and maritime principles to fixed platforms. Therefore, this Court held that Louisiana tort law, and not maritime law, would apply to cases arising on fixed platforms on the Outer Continental Shelf.

In the context of *Rodrigue*, the plaintiffs were provided more expansive remedies than would have been allowed under DOHSA and, therefore, the application of Louisiana law inured to the benefit of the plaintiffs. However, two years after *Rodrigue*, this Court again applied Louisiana law, but the rule established was detrimental to plaintiffs in OCSLA cases. In *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S. Ct. 349 (1971), the issue was whether Louisiana's one year prescription statute (statute of limitations) would apply rather than the admiralty doctrine of laches. The Court of Appeal held that despite the holding in *Rodrigue* rejecting maritime law, the laches doctrine was applicable as a matter of "federal common law". This Court flatly rejected this notion and stated:

> As we pointed out in *Rodrigue*, Congress recognized that the federal code was never designed to be a complete body of law in and of itself and thus that a comprehensive body of state law was needed. Congress also recognized that the special relationship between the men working on these artificial islands and the adjacent shore to which they commute favored application of state law with which these men and their attorneys would be familiar. **If Congress' goal was to provide a comprehensive and familiar body of law, it would defeat that goal to apply only certain aspects of a state personal injury remedy in federal court. A state time limitation upon a remedy is coordinated with the substance of the remedy and is no less applicable under [OCSLA].**

404 U.S. at 102-3, 92 S. Ct. at 353-54 (citations omitted emphasis added).

Importantly, this Court in *Huson* rejected the Court of Appeals' attempt to apply laches as a matter of "federal common law" because the approach "subverts the congressional intent documented in *Rodrigue*, . . . that admiralty doctrines should *not* apply under the Lands Act." 404 U.S. at 104, 92 S.Ct. at 354. In concluding its discussion regarding why the Louisiana prescriptive statute would apply over the purported "federal common law" doctrine of laches, this Court stated:

> Congress specifically rejected national uniformity and specifically provided for the application of state remedies which demand state, not federal, statutes of limitation. **Thus, Congress made clear provision for filling in the gaps in federal law; it did not intend that federal courts fill in those gaps themselves by creating new federal common law.** 404 U.S. 104-105, 92 S.Ct. 354 (Emphasis added.)

Thus, in *Huson*, this Court established that **all** aspects of Louisiana law governing a tort action would apply to cases arising on fixed structures on the outer Continental Shelf offshore Louisiana. Following the lead of this Court, the Fifth Circuit Court of Appeals has consistently rejected attempts to have maritime principles applied to personal injury claims arising on fixed platforms on the Shelf, even where application of state law was to the detriment of the injured person. Thus, in *Bertrand v. Shell Oil Co.*, 489 F.2d 293 (5th Cir. 1973), the Fifth Circuit ruled that the Louisiana rule of contributory negligence (which barred plaintiff's recovery) applied despite the argument that Louisiana's rule was inconsistent with the federal maritime rule of comparative fault. Likewise, in *In Re: Dearborn Marine Service, Inc.*,

499 F.2d 263 (5th Cir. 1974), the Fifth Circuit ruled that the Texas rule of contributory negligence would apply as opposed to the federal maritime rule of comparative fault.

Of course, the adoption of state law in OCSLA cases was not always to the detriment of the injured person. Thus, when the doctrine of strict liability existed under Louisiana law, the Fifth Circuit held that it was bound to apply the Louisiana doctrine of strict liability to injuries occurring on fixed structures on the Outer Continental Shelf. *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983). More recently, in *Marcel v. Placid Oil Co.*, 11 F.3d 563, 570-71 (5th Cir. 1994) the Fifth Circuit adopted the plaintiff-friendly Louisiana rule of using "pre-tax" wages in computing damages for lost wages and lost earning capacity as opposed to the "federal common law" rule of using "after tax" wages in computing damages.

The foregoing makes it clear that Louisiana tort law is applicable to personal injury actions arising on platforms on the Outer Continental Shelf offshore Louisiana whether the result is beneficial or detrimental to the injured worker. Otherwise, Congress' goal of providing a "comprehensive and familiar body of law" would be defeated if "only certain aspects of a state personal injury remedy" were applied in OCSLA cases. *Huson, supra,* 404 U.S. at 103. Thus, the fact that application of a particular aspect of state tort law may reduce, or outright defeat, a plaintiff's recovery in an OCSLA case does not affect the question of whether state law is applied. OCSLA mandates that **all** aspects of state tort law, including the comparative fault rule found in Louisiana Civil Code Article 2323, must be applied in a non-maritime third party tort suit arising on an OCSLA platform.

In its decision below, the Fifth Circuit correctly noted that the particular Louisiana law at issue in this case, Louisiana Civil Code Article 2323, which adopted the rule of comparative fault in Louisiana, actually allowed Petitioner's claim against ENSCO to survive, despite the finding that Petitioner was assessed with 25% of the fault in causing his injury. *Fontenot*, 179 F.3d at 976. By its adoption in 1979, Article 2323 eliminated the application of the common law rule of contributory negligence as a bar to the plaintiff's recovery in Louisiana. Indeed, Louisiana Civil Code Article 2323 was enacted by the Louisiana legislature in 1979 to establish a "pure" comparative negligence regime in Louisiana whereby the plaintiff's contributory negligence did not bar his recovery but reduced it by his or her proportion of fault.[1] As discussed in the next section, there is absolutely nothing in the Longshore and Harbor Workers' Compensation Act which addresses the defenses available to a defendant in a non-maritime tort action and therefore there is absolutely no prohibition to the application of Louisiana's rule of comparative fault in this OCSLA case.

B.

THE LONGSHORE AND HARBORS WORKERS' COMPENSATION ACT DOES NOT ADDRESS QUANTIFICATION OF EMPLOYER FAULT AND, THEREFORE, THERE IS NO INCONSISTENCY BETWEEN THE LHWCA AND LOUISIANA'S COMPARATIVE FAULT RULE.

Petitioner contends that Louisiana's comparative fault rule is inconsistent with 33 U.S.C. § 933. Petitioner's

1. For a discussion of the development of comparative fault in Louisiana, see F. Maraist and T. Gallagan, *Louisiana Tort Law*, pp. 189-193 (1996).

argument is premised on the notion that because the employer's lien is treated differently under the LHWCA than it is under the Louisiana Workers Compensation Act, that creates an inconsistency between Louisiana's substantive tort law of comparative fault and the provisions of the LHWCA. However, Petitioner fails to acknowledge that 33 U.S.C. § 933 does not, in any manner, address the defenses available to a defendant in a third party tort action. As the Fifth Circuit correctly noted below, the only provision in the LHWCA which applies in any manner to a third party tort action is Section 905(b), which by its terms only applies to the longshoreman's claim against a vessel. As the Fifth Circuit below expressly noted:

> That common tripartite situation addressed in *Edmonds* is not present in this case. There is no vessel in this case; there is no vessel owner in this case; there is no stevedore in this case; and the injured worker was not engaged in any activities related to loading or unloading a vessel at the time of his injury. 179 F.3d 976.

More to the point, however, was the Fifth Circuit's recognition that

> the proportionate-liability scheme imposed by Louisiana law cannot be *inconsistent* with federal law because there would be no third party cause of action in this case had Louisiana not provided one. *Edmonds* is not to the contrary because that case dealt with a federal third party cause of action created by Section 905(b) involving a vessel. 179 F.3d 976.

Petitioner's "inconsistency" argument boils down to the fact that the recovery of the injured employee in a third party action is less when the employee is covered by the LHWCA than when he is covered by the Louisiana Workers Compensation Act. It is true that the Louisiana Workers Compensation Act requires reduction of the employer's lien by the fault of the employer and the injured employee. Application of the Louisiana Workers' Compensation Act in an OCSLA case would result in an inconsistency with the LHWCA (in view of the judicial treatment given the jurisprudentially created lien in favor of the LHWCA employer). However, the Louisiana Workers Compensation Act is **not** involved in this case.

In OCSLA, Congress specifically made state law applicable to the non-maritime third party tort claim and the LHWCA applicable to the compensation remedy. However, Petitioner is requesting this Court to ignore the language of the statute and to develop a rule of federal common law applicable to this OCSLA case based on his contention that application of all aspects of Louisiana tort law may result in a diminution of his recovery. However, Petitioner's argument is directly contrary to this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971), where this Court rejected the notion that federal courts should create new federal common law or otherwise only apply certain aspects of a state personal injury remedy in OCSLA cases. Petitioner suggests that he is entitled to the best of both worlds – he wants the full benefit of the generous compensation benefits provided by the LHWCA and he wants only the positive aspects of Louisiana tort law. However, *Huson* establishes that Petitioner is bound by all aspects of Louisiana's tort law as it exists and that courts are not free to create federal common law to remedy some perceived inequity.

C.

PETITIONER'S EXTENSIVE RELIANCE ON *EDMONDS* IS MISPLACED.

Petitioner relies extensively on this Court's decision in *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 99 S. Ct. 2753, 61 L. Ed. 2d 521 (1979) in his effort to have this Court disregard Louisiana's comparative fault rule. However, Petitioner's reliance on *Edmonds* is misplaced. The sole issue this Court addressed in *Edmonds* was whether the 1972 amendments to the LHWCA changed the "long established and familiar principle" of maritime law that the injured longshoreman could recover from the negligent vessel owner the full extent of his damages, reduced only by the percentage of the longshoreman's own fault. The vessel owner had argued that the 1972 amendments to Section 905(b) of the LHWCA changed the applicable law to require that the vessel owner could only be liable for that share of the total damages which was equivalent to the ratio of its fault to the total fault. 443 U.S. at 260, 99 S. Ct. at 2755. Finding a complete lack of textual support for this argument in the LHWCA, this Court rejected the argument and stated that if Congress had intended to change this long recognized maritime rule, it would have done so in the 1972 amendments to the LHWCA, but was silent in this regard: "This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." 443 U.S. 266, 99 S. Ct. 2759.

Thus, *Edmonds* was limited to the issue of whether the 1972 amendments to Section 905(b) changed the long established maritime rule of joint and several liability. While *Edmonds* involved a discussion of the provisions of the

LHWCA applicable to the employer's lien, that discussion was in the context of whether there was any congressional intent to modify the established maritime rule of joint and several liability in the 1972 amendments to the LHWCA. Most importantly for this case is that the *Edmonds* Court made it clear that it was **not** addressing claims against third parties which were not governed by maritime law. Thus, at footnote 31 of its opinion, the *Edmonds* Court noted:

> Of course, our decision does not necessarily have any effect on situations where the [LHWCA] provides the workers compensation scheme where the third party action is not governed by principles of maritime law.

433 U.S. at 274, 99 S. Ct. at 2762, n.31.

The fact that the principles of maritime law would have no application to a case governed by OCSLA was made clear by this Court in *Rodrigue, supra.* Petitioner stresses that *Edmonds* left open the question of whether Congress intended to adopt the existing maritime rule for third party actions under the LHWCA that are not within the admiralty jurisdiction. However, that question was **not** left open in cases governed by OCSLA, where Congress itself foreclosed the application of maritime principles in cases arising on platforms on the Outer Continental Shelf.

CONCLUSION

In its decision below, the Fifth Circuit correctly considered the history of the Outer Continental Shelf Lands Act and this Court's interpretation of that statute in *Rodrigue* and *Huson*. Petitioner requests this Court to apply a maritime rule of decision or alternatively to develop a new federal common law rule which would displace certain aspects of Louisiana tort law in an OCSLA platform case. This Court's previous decisions dictate that such a result would be contrary to OCSLA. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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